

Office of Chief Counsel
Internal Revenue Service
Memorandum

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to: Janice R. Feldman
(National Taxpayer Advocate) CC:NTA

from: Pamela W. Fuller
(Procedure & Administration) CC:PA:B03

subject: Lien Attachment and Unregistered Conveyance

This responds to your request for our views on the issues raised in the case referenced above. The facts as we understand can be summarized as follows: Husband and Wife purchased real property in . They divorced in . The divorce decree awarded Wife the property and ordered Husband to execute a quitclaim deed. Husband incurred post-divorce tax liabilities for which were assessed, with a Notice of Federal Tax Lien filed in . In , the divorce decree and a quitclaim deed, dated ,¹ were filed with the Register's Office in .

The local Taxpayer Advocate Service requested field counsel's views on whether the federal tax lien attaches to the real property which the divorce decree awarded to the taxpayer's wife but for which no registration had been filed prior to the NFTL. The field concluded that the property is subject to collection. As discussed below, we agree.

If the taxpayer has any property interest in the real estate, then the federal tax lien attaches; if he does not, it does not. As a preliminary matter, we note that the under Tennessee law courts are "empowered to effectuate its decree by divesting and reinvesting title to [the] property." T. C. A. § 36-4-121(a)(3). Here, the divorce decree awarded Wife "all right title and interest to and in [the property], and any interest [Husband] has in [the] property shall be divested out of [Husband] and vested solely in [Wife.]" It ordered Husband to execute a quitclaim deed transferring all his right, title,

¹ The fact that the date on the quitclaim was apparently changed to while the deed appears to have been filed in has no bearing on the disposition of this matter.

and interest in the property to Wife. We note that faced with similar, though not identical, language in In re Kelley, 304 B.R. 331 (Bankr. E.D. Tenn. 2003), the Bankruptcy Court observed that it is not clear that the divorce decree “awarding” property to one spouse and ordering the execution of a quitclaim deed, in fact, divested the debtor of the property at issue. 304 B.R. at 336. If the decree here in no way itself divested Husband of this interest, no further discussion would be necessary—clearly at the time the government’s lien arose, he would have had an interest in the property.² Assuming that a decree such as the one in this case does itself divest a spouse of his interest in property, the extent of that divestiture might turn on some other factor.

The requirements of state recording/filing statutes might be such a factor. Under Tennessee law, certain instruments are effective between the parties without registration; but as to other persons, not having actual notice of them, only from registration. T.C.A. § 66-26-101. More specifically, unregistered instruments are “null and void as to existing or subsequent creditors of, or bona fide purchasers from, the makers without notice.” T.C.A. § 66-26-103. In Tennessee, a quitclaim deed is a type of instrument that may require registration, see T.C.A. § 66-24-101, as is a divorce decree divesting one spouse of property. See T.C.A. § 66-24-101; In re Frasier, 47 B.R. 864 (Bankr. M.D. Tenn. 1985)(a divorce decree must be registered to be effective as a conveyance of real property against creditors and bona fide purchasers).

As noted in your email, there is case law in the Fifth Circuit that holds that in the Fifth Circuit, the United States is a creditor protected under the Texas Recording Act and the federal tax lien attached to real property, and there is conflicting case law in the First, Eighth and Tenth Circuits holding that, recording statutes at issue notwithstanding, after the transfer of property the taxpayer has no remaining interest in the property which can support the attachment of the federal tax lien. The Husband and Wife in this case reside within the Sixth Circuit. The Court of Appeals for the Sixth Circuit has not opined on this issue.

In United States v. Creamer Industries, Inc., 349 F.2d 625 (5th Cir. 1965), cert. denied, 382 U.S. 957 (1965), the first Court of Appeals opinion on the issue, the Fifth Circuit correctly stated the issue as:

The question to be decided is whether at the time of the assessment on March 24, 1959, the taxpayer, Maxwell, owned any property or rights to property in the six lots upon which the tax lien could fasten. The nature and extent of Maxwell's interest in the lots on that date must be determined by state law.

349 F.2d at 628. It observed generally that the determination of the seller’s interest as between the seller and the purchaser may differ from the determination of the seller’s interest with respect to a creditor without notice. The court went on to note that under

² At the time the federal tax lien arose, the quit claim deed had not been registered or even executed.

the Texas statute at issue unrecorded conveyances are void as to creditors and bona fide purchasers without notice, but between the parties and as to purchasers with notice or who have not given valuable consideration such conveyances are valid and binding. The court concluded that “[a]s to the taxes owed to it, the United States was a ‘creditor’ within the Texas recording statute” and that, therefore, the federal tax lien attaches. The dissenting opinion in Creamer Industries stated that after the transfer, there was no longer any property “belonging to” the taxpayer under section 6321 and the Service is not the type of party that the Texas recording statute was intended to protect. After Creamer Industries, in Prewitt v. United States, 792 F.2d 1353 (5th Cir. 1986), a case involving a divorce decree, the court followed Creamer Industries, rejecting the dissent’s argument and concluding that “the right of certain of [the husband’s] creditors to reach property he formerly owned until the disposition is properly recorded is sufficient to support a tax lien on the property.” 792 F.2d at 1355-1356.

Each of the cases in the other Courts of Appeals similarly presented the issue of what property right remained with a transferor after a transfer where the transfer was not recorded as provided by a state recording statute. The first rejecting the conclusion in Creamer Industries, and instead concluding that the property was not subject to federal tax lien after its sale, was United States v. V. & E. Engineering & Construction Co., 819 F.2d 331 (1st Cir. 1987). While V. & E. Engineering rejected the conclusion of Creamer, it did so by attempting to distinguish the state statute at issue in the case from the statute in the Texas case. This initially may seem to provide some support for the reasoning of Creamer Industries: The court in V. & E. Engineering noted that the Texas statute in Creamer Industries, “explicitly states that an unrecorded sale ‘shall be void as to all creditors and subsequent purchasers for a valuable consideration without notice.’ [citation omitted.] The Puerto Rico statute, by contrast, is not phrased in terms of the validity of the transaction or the rights of creditors but in terms of the protection afforded a good faith purchaser.” 819 F.2d at 334. However, we note that while the First Circuit rejected the conclusion in Creamer Industries by trying to distinguish the statutes in the cases, the statutory schemes are not meaningfully distinguishable.³ In any event, after observing that Puerto Rico law provides that a sale is binding on the parties and therefore the transferor is bound by the sale of the property, regardless of the recording the purchaser, the court found that the seller would have no right to property under 26 U.S.C. § 6321.

In Thomson v. United States, 66 F.3d 160 (8th Cir. 1995), the Eighth Circuit reasoned that “the plain meaning of the words ‘belonging to’ [in section 6321] suggests that the

³ Although the court did not so note in the opinion, the Texas law in Creamer Industries, like the Puerto Rico law, provided that the transfer is binding between the parties. Moreover, while the court notes that the Puerto Rico statute does not have the “void” language contained in the Texas statute, under the statutes of both states a transfer is, in fact, going to be ineffective as to a certain party or parties absent recording.

lien attaches to property interests owned by the taxpayer, not property interests vulnerable to the taxpayer's judgment creditors." 66 F.3d at 162. The court found the reasoning of the First Circuit case law more persuasive than that of the Fifth Circuit. The court then considered the Minnesota statute in light of the foregoing. That statute provides that unrecorded conveyances are "void as against any subsequent purchaser ... whose conveyance is first duly recorded, and as against ... any judgment lawfully obtained ... against the person in whose name the title to such land appears of record prior to the recording of such conveyance." ⁴ The court found that if a statute provides that title does not pass until a conveyance is recorded, the transferor retains a post-transfer interest. On the other hand, the court found, if a statute makes an unrecorded transfer void or voidable as against parties such as subsequent judgment creditors or bona fide purchasers, the transferor retains no post-transfer interest. The court concluded that the Minnesota statute falls into the latter category, and therefore does not give the taxpayer any property right to which the § 6321 lien may attach.

The Tenth Circuit reached the same result in United States v. Gibbons, 71 F.3d 1496 (10th Cir. 1995), based on a Colorado statute providing that "[n]o such unrecorded instrument or document shall be valid as against any class of persons with any kind of rights who first records, except between the parties thereto and such as have notice thereof." There, the court reasoned that "[t]he IRS must stand in the shoes of [the taxpayer], who has no 'rights to property,' I.R.C. § 6321, to which the tax lien could attach in the property interest conveyed to Betty Gibbons. Therefore, the IRS lien against property 'belonging to' [the taxpayer] does not reach [the ex-wife's] interest." 71 F.3d at 1501.

While the government has not prevailed in the three Courts of Appeals that have considered this issue since Creamer Industries was decided, we continue to believe that case was correctly decided. Applied to the present case, we note that under the Tennessee statute, an unregistered conveyance is void as to, inter alia, existing or subsequent creditors. We have not found anything that indicates that the Service would not be a creditor under state law. Nor have we uncovered anything under state law that would require as restrictive a meaning of "void as to existing and subsequent creditors" as would be required by the other Courts of Appeals. There is language in an 1836 Tennessee case that, at first impression, lends support to the position of the other Courts of Appeal that the taxpayer has no interest in property after its transfer. In Shields v. Mitchell, 18 Tenn. 1, 1836 WL 1188 (Tenn.), the Tennessee Supreme Court stated:

The vendor, by the execution of the deed, has divested himself of his legal estate; no title, legal or equitable, remains in him; he is seized of nothing for the use of the vendee; he is not a trustee for the vendee. The

⁴ We note that the Minnesota statute at issue in Thomson is similar to, but not identical to, the Texas statute in Creamer Industries.

title passes from him, and no acts to give it effect remain to be done by him. If the legal title be not perfected in the vendee until registration, it does not remain in the vendor. Upon registration, the perfect and entire legal title, by relation and operation of law, vests in the vendee from the execution of the deed. If it be never registered, it does not revest in the vendor.

However, the Shields case was addressing the nature of the purchaser's interest—whether the purchaser holding property under an unregistered deed had sufficient interest in the property to subject the property to seizure. The case did not involve determining the effect of nonregistration on the creditors of the seller. In that situation, it was the rule then in Tennessee as it is now: As to certain parties, conveyances have no effect until registration. See, e.g., Hays v. McGuire, 16 Tenn. 92, 1835 WL 907 (Tenn.)

Further, the reasoning of the First, Eighth, and Tenth Circuits is flawed. Those courts failed to give full meaning to state statutes that provide that a transfer is void or ineffective as to certain parties absent recording: The characterization that the relevant state provisions merely protect creditors and other third parties or merely address the rights of third parties ignores that they do so by voiding the conveyance as to those parties. In other words, for those parties, that conveyance did not occur, and, as to those parties, the transferor does have an interest in the property.

The First, Eighth, and Tenth Circuits would ignore that this is the result called for by the Tennessee statute. As the Bankruptcy Court noted in In re Hurst, 27 B.R. 740 (Bankr. E.D. Tenn 2003) in which the bankruptcy trustee challenged an unregistered divorce decree:

A determination by this court that the defendant's right to occupy the contested premises is paramount to the trustee's rights under § 544(a) would ignore the provisions of Tenn.Code Ann. § 66-26-103 (1982) and numerous decisions interpreting the precursors of that statute. ... 'The purposes of the statute are obvious, and the penalty imposed for its nonobservance is harsh. Such unrecorded conveyances, at least insofar as they affect the rights of creditors, are void.' In re Sweat, Bankruptcy No. 4660 (E.D.Tenn.1930).

See also In re Frasier, 47 B.R. 864 (Bankr. M.D. Tenn. 1985) (had bankruptcy trustee established status as hypothetical lien creditor as required by B.C. § 546, he could have claimed, pursuant to T.C.A. § 66-26-101 et seq., an undivided half interest as a tenant in common in property awarded to Wife in unregistered divorce decree.)

For the reasons stated above, the Husband had an interest in the property that was subject to collection by the Service. If you would like to discuss this further, please contact Deborah Grogan at (202) 622-3600.